

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: ) Case No. 1:17-md-2804  
)  
NATIONAL PRESCRIPTION )  
OPIATE LITIGATION, )  
) Wednesday, February 28, 2024  
)

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS

*HELD VIA ZOOM VIDEOCONFERENCE*

BEFORE THE HONORABLE DAN AARON POLSTER

UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography; transcript  
produced with computer-aided transcription.

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15 ALSO PRESENT:

16 Carrie Roush, Law Clerk  
17 Corey McCardle, Courtroom Deputy  
18 David Cohen, Special Master  
19 A. Scott Loge  
20  
21  
22  
23  
24  
25

1 WEDNESDAY, FEBRUARY 28, 2024

2 (Proceedings commenced at 1:49 p.m.)

3 THE COURT: Okay. Good afternoon, everyone.  
4 Thank you for being available.

5 The thing I want to try and accomplish this afternoon  
6 is to sort of reset the tone and dial down the temperature.  
7 I know I said some time ago that I thought OptumRx's filing  
8 the motion to disqualify Motley Rice was a very bad idea,  
9 and that it might create and generate a lot of ill will,  
10 which would make this litigation difficult. Well, sadly, I  
11 was proven correct. And it's my job to dial things down.

12 I had said many times in this MDL that the reason it  
13 succeeded is because we had the best lawyers in the country  
14 and they have known how to zealously represent their  
15 clients, but also cooperate so that the enterprise moved  
16 forward. And that's why we have accomplished so much over  
17 the last six years. I mean, each side, each party has been  
18 able to do all the discovery they wanted to develop their  
19 theories of liability and their defenses. We've had I think  
20 fair trials in federal court, state court; we had  
21 settlements; we've done it all. You know, we've done it  
22 all.

23 And my suggestion is that -- Mr. Boone, that you  
24 contact the counterparts, your counterparts for the  
25 manufacturers, distributors, and pharmacies and just talk to

1       them a bit about how things have gone.

2               And I would suggest that the client reps we have, you  
3       know, for OptumRx, Ms. Hasan and Mr. Kokkinen, do the same;  
4       call the general counsels for the manufacturers,  
5       distributors, pharmacies, and just ask them -- I mean,  
6       because, you know, you're coming in late, five, six years  
7       down the road, and no one can expect you to know and  
8       understand all that.

9               But I would suggest you do that because we've -- you  
10      know, I don't want this, you know, to run off the rails.  
11      And, you know, we've had a procedure in place that, you  
12      know, has worked very well, and it's going to continue here.  
13      First, the parties meet and confer on just about everything  
14      that -- again, the best lawyers in the country. And you  
15      hopefully will agree on most things.

16             And when you have a disagreement, then you meet with  
17      Special Master Cohen, and he gives you some informal  
18      guidance, and hopefully that will resolve many of the  
19      disagreements. And the ones that can't, if you need a  
20      formal ruling from Special Master Cohen, he will tell you  
21      what submissions to make, and he will make his formal  
22      written ruling. And then if either side thinks that he is  
23      really, really wrong, then that side can appeal to me and  
24      I'll, you know, issue an -- order an opinion.

25             Over the last five, six years, there have been some

1 but not a ton of formal rulings that Special Master Cohen  
2 has had to make. And there have been a handful of appeals,  
3 but only a handful. And, you know, I think that's the way  
4 it should be.

5 Request for formal rulings should not be reflexive,  
6 and appeals to me certainly shouldn't be. And if -- you  
7 know, if Special Master Cohen is inundated with a lot of  
8 unnecessary requests for formal rulings, he'll just start  
9 doing one-paragraph rulings. And, trust me, if I get --  
10 start getting a lot of appeals and I think the appeals are  
11 just being reflexive, I will just, you know, deny them in  
12 marginal entries, won't write a thing. Any judge would do  
13 the same. I don't want to go down that road, but, I mean,  
14 that's -- if I have to, I will.

15 So -- and I really don't need lawyers for either side  
16 telling me what my prior rulings mean or had meant. I know  
17 what I meant. And if there's a question about it, I will  
18 reaffirm them or make that -- or make that clear. And  
19 there's some rulings that may have meant something five  
20 years ago, but things are -- have evolved.

21 And, again, there have been a lot of rulings in this  
22 MDL, and OptumRx and Express Scripts didn't really have to  
23 care about most of them over the last five years because you  
24 weren't involved in any litigation, all right? So no one  
25 needed your documents, no one was litigating against you.

1 Now when we have these bellwethers, things are different.  
2 So the rulings are -- do apply to you, and you got to follow  
3 them.

4 Now, again, I made it clear that a ruling that OptumRx  
5 or Express Scripts didn't participate in doesn't  
6 automatically bind you, but it is the law of the case. So  
7 you've got to demonstrate to me why it shouldn't apply to  
8 you, why either the law has changed or what you do or how  
9 you do it, it is -- makes it -- makes your situation  
10 different, and that I should rule differently, so it  
11 presumptively applies. But you have the opportunity to tell  
12 me why it shouldn't or why I should do something different  
13 with you vis-à-vis other defendants because your situation  
14 is different. And if you've got a good basis, of course  
15 I'll review that.

16 So, you know, again, I want to -- I think I've had a  
17 fairly light hand for six years. Others might disagree --  
18 *Wall Street Journal* certainly did -- but I think I had. I  
19 let the lawyers, you know, investigate, discover their case,  
20 and, when they had a trial, try their case. And I want to  
21 continue doing that.

22 So that really is most of what I wanted to say. I  
23 mean, again, I have things I can do that I'd rather not do.  
24 I mean, right now, for example, all of -- the Special Master  
25 and his team, their time is split 50/50 between the

1 plaintiffs and the defendants writ large. I mean, I can  
2 change that. If I think that either the plaintiffs or a  
3 particular defendant is unnecessarily expending resources, I  
4 can change that allocation. I can say that a particular  
5 defendant has to pay most or all of the defendant's share.  
6 Doesn't have to be spread among all the other defendants.  
7 And of course in an extreme case I can order one side or the  
8 other to pay the other side's attorney's fees. I think I've  
9 done that maybe once in this MDL. Again, I don't want to go  
10 down that road.

11 So really that was -- that was, you know, the purpose  
12 of this call. I didn't plan to make any rulings or have  
13 lawyers argue any motions. I sensed that things were  
14 getting a bit out of control.

15 And I think there was something in one of the PEC's  
16 filings that said they're no longer going to meet informally  
17 with OptumRx, everything has to be done in writing. Well,  
18 that is unacceptable and untenable. You can't do it, okay?  
19 The MDL couldn't work that way, couldn't have worked with  
20 any other defendant. We would have run aground a long time  
21 ago.

22 So lawyers have to be able to do what lawyers do best,  
23 which is meet and talk to each other, all right? You have a  
24 disagreement, you know how to work things out. We're the  
25 people in this country who know how to disagree agreeably.



1 The rest of the country darned has forgotten it; but if we  
2 forget it, then there's no hope for the rest of the country.  
3 We know how to do it.

4 So that really was all I had to say. Again, I wasn't  
5 going to have, you know, argument on what DR-22 means or who  
6 has to do what, when or how.

7 So I've finished saying what I wanted to say.  
8 Certainly I'm open to hearing from anyone.

9 MR. BOONE: Your Honor, this is -- can you  
10 hear me? This is Brian Boone.

11 THE COURT: Yes, Brian.

12 MR. BOONE: Excuse me.

13 From Alston & Bird for OptumRx.

14 You're right. We're here today because of the  
15 disqualification motion. We stand by that motion.

16 I'll just add that Motley Rice and the PEC moved to  
17 disqualify Endo's counsel, so we haven't done anything  
18 differently from what Motley Rice did before.

19 THE COURT: Well, Endo was different, okay?

20 Endo -- that was a very unusual situation. I actually  
21 held an evidentiary hearing on that. You know, whether it  
22 was a good idea or not to do it, I don't know. I didn't --  
23 that was a difficult spot for me because it was a lawyer I  
24 knew quite well. But it was a very unusual circumstance.  
25 And I made it very clear that I didn't want it to derail the

1 MDL or turn the MDL into armed warfare, and I think the way  
2 I handled that prevented that from happening, so...

3 But you're right, it could -- it could have derailed  
4 things, Brian, all right? It had the potential. And I, you  
5 know -- I think we took steps even to try and head it off,  
6 but there was -- it couldn't be resolved, so we did it. And  
7 I remember having that hearing, and I didn't want to have  
8 that hearing. But maybe having gone through it once...

9 But anyway, you filed it, all right? So, fine, but  
10 the point is I'm not going to -- I'm not going to let that  
11 turn the litigation into -- involving OptumRx into armed  
12 warfare. That isn't going to happen, so...

13 And whatever happens, it's not going to delay the  
14 litigation one iota. If I have to spend all of my waking  
15 hours dealing with the PEC and OptumRx, I will do it. I am  
16 not going to delay any of the deadlines.

17 So if anyone's doing anything for -- I'm not saying  
18 you are, but I've been around the block a lot in 25 years,  
19 and I have known counsel to do certain things because they  
20 wanted to delay the case from moving forward. This case is  
21 going to be delayed by anything anyone files. What have --

22 MR. BOONE: Your Honor --

23 THE COURT: Whatever --

24 (Unreportable crosstalk.)

25 MR. BOONE: I'm sorry. I didn't mean to

1 interrupt.

2 I can tell you we didn't do it for delay. That was  
3 not our intent. We did it because --

4 THE COURT: Well, I didn't say you did, Brian.  
5 But I'm just making it clear to all lawyers and the clients  
6 that whatever anyone does or files, it's not going to delay  
7 the litigation.

8 MR. WEINBERGER: Your Honor, on behalf of the  
9 PEC, we very much appreciate your comments, and we take them  
10 to heart as we always have throughout the years of  
11 litigation. And we certainly stand ready to meet and confer  
12 with Mr. Boone and with Olga and her team.

13 The -- I just want you to know that what prompted the  
14 e-mail that we would -- you know, we would no longer meet  
15 and confer with Mr. Boone I think has now been addressed by  
16 you, and that has to do with the fact that every time we  
17 brought up scope of discovery as it relates to prior rulings  
18 that you made, we -- the response that we got across the  
19 board was "We don't believe those rulings apply." They  
20 would not even admit that they had any precedential value,  
21 and so we were left with basically starting from the  
22 beginning.

23 And we -- I'm not accusing Mr. Boone or Ms. Vieira of  
24 delaying tactics, but when you're faced with the initial  
25 phase of discovery being answered with over 400 pages of

1 objections and really no meaningful production, and we are  
2 also faced with this continuing theme from Mr. Boone  
3 particularly, that somehow we're motivated by the motion --  
4 by the motion to disqualify and the positions were taken and  
5 that they're unwilling to be -- to recognize the  
6 precedential value of your prior rulings, it's a little bit  
7 difficult to have a conversation that's meaningful and that  
8 moves things forward.

9 That having been said, I think we've demonstrated,  
10 Your Honor, over these past six-and-a-half years that we are  
11 prepared to sit down with the defendants. There are  
12 oftentimes difficulties in reaching agreement, but we  
13 certainly can narrow the scope of our disagreements. And  
14 we -- we intend to continue to act in a professional way as  
15 we have for the last six-and-a-half years with respect to  
16 discovery, and we are not going to engage in name-calling or  
17 suggest that people are taking frivolous positions because  
18 that doesn't really accomplish anything.

19 And so you have our -- you have -- if I can speak on  
20 behalf of the PEC -- and I know I can -- you have our  
21 commitment to acting in a very professional way to bring  
22 this litigation forward because that really is what we're  
23 trying to do on behalf of our clients.

24 THE COURT: All right. Well, thank you, Pete.

25 And, you know, the reason I wanted the client reps on

1 and why I suggested that, you know, you talk to your  
2 counterparts is that, as I've said, for six years we have --  
3 lawyers on both sides had very vigorously and aggressively  
4 pursued their clients' interests, as they're ethically bound  
5 to in this very, very important litigation, but they've done  
6 it, you know, 99.9 percent of the time in a very  
7 professional way. And they've understood that they can't  
8 fight about everything or else everyone loses. The  
9 plaintiffs lose, and all the defendants would go bankrupt.  
10 So that doesn't accomplish anything. And if it leads to  
11 settlements, fine. If it leads to trials, fine. If trials  
12 lead to settlements, fine. If they don't, they don't. No  
13 one -- no one knew any of the outcomes when we started.

14 So, you know --

15 MR. FARRELL: Judge, this is --

16 THE COURT: I'm very confident that we can do  
17 the same with this bellwether process with OptumRx and  
18 Express Scripts, so...

19 MR. BOONE: Your Honor, I just wanted to  
20 clarify one thing.

21 There is Brian Boone for OptumRx.

22 I know you said earlier you're not making rulings  
23 today. You also said that the previous rulings were law of  
24 the case.

25 THE COURT: Right.

1 MR. BOONE: I just want to clarify that you're  
2 not -- you're not saying that they technically bind the  
3 PBMs, because if you're saying that, we certainly would want  
4 to brief that issue, which I think is what you said we can  
5 do.

6 THE COURT: Well, they presumptively -- they  
7 presumptively bind you because they are the law of the case.  
8 They're the law of this MDL, Mr. Boone, okay? That's how it  
9 is.

10 But you always have the opportunity to -- if you feel  
11 that a prior ruling -- for example, if there's a new case, a  
12 Sixth Circuit case, Supreme Court case, whatever, that  
13 suggests what I did was unlawful, of course you bring it to  
14 my attention. If you think that the facts and the  
15 circumstances of the PBMs are significantly different than  
16 those that say the ruling was in the context of  
17 distributors, then absolutely you have right to point out to  
18 me why there should be some change with respect to your  
19 client and/or Express Scripts.

20 But the rulings presumptively apply to you, and the  
21 procedure that I've set up absolutely applies, and so it's a  
22 long way from a dispute to some motion that's filed and that  
23 I'm -- you know, I've insisted that everyone follow, and  
24 it's worked very, very well.

25 And most of the disputes have been resolved

1 informally. Special Master Cohen has resolved a lion's  
2 share of them just by talking to people, giving some  
3 suggestions, maybe some suggestions about he might rule or  
4 what he thinks I'm thinking, all right? And so it's worked  
5 very well. Obviously, if I've got to make a decision, I'm  
6 capable of making them. I have no problem with that, but...

7 So that procedure is the one we followed for six  
8 years, and it has documented success. So we're going to  
9 follow it with OptumRx and Express Scripts.

10 MR. FARRELL: Judge, this is Paul Farrell.

11 THE COURT: Yes, Paul.

12 MR. FARRELL: I guess I wanted to kind of --  
13 I'm thankful for a reset, and I look forward to resetting  
14 with Mr. Boone in particular. This is not intended to be  
15 into the weeds. This status conference was intended to help  
16 us get over two primary obstacles so that we could get into  
17 the weeds. So I -- I intend to have no substantive position  
18 on DR-2, DR-3, or DR-22. Those are weeds that need to be  
19 addressed.

20 In order to get to those, there are two primary  
21 obstacles. And number 1 is the precedential value of prior  
22 rulings. And might I suggest that where we're at today with  
23 the PBMs is where we were at in docket number 4978, which is  
24 CT-7, where Kroger's made the same arguments that Optum and  
25 ESI are making, and that is -- and I'll quote you, Judge --

1 relatively new active participants. And that's what ESI and  
2 Optum are, they're relatively new participants in this  
3 process. And in 4978 you addressed what the meaning of the  
4 law of the case meant for them.

5 And so what we are -- have been -- the obstacle we  
6 have is that there are precedential-weighted arguments that  
7 we need to get to, and so question number 1 is whether or  
8 not we are going to follow the weight that is provided by  
9 you in several prior orders regarding to -- we're not  
10 starting over, but we are certainly able and willing to  
11 raise new arguments that are new or that the old rulings are  
12 inapplicable for some new reason. We just need to be able  
13 to get to that standard, if you will.

14 THE COURT: Well, we're there. That's what I  
15 just said, Paul.

16 MR. FARRELL: Yes, sir.

17 THE COURT: We're --

18 MR. FARRELL: Thank you, Your Honor.

19 The second problem -- not problem. The second  
20 obstacle is that we attempted to utilize Special Master  
21 Cohen to guide us through this process. And what I -- what  
22 we filed this motion for is to basically do what you did  
23 today, and that is to affirm the authority and role of the  
24 Special Master as identified in docket 69, which is your  
25 appointment order, and docket 3527, footnote 12, wherein



1 Walmart challenged the process.

2 And so we would like to be able to utilize the same  
3 process that we've been using for six years to go to Special  
4 Master Cohen to raise with him the opportunity to informally  
5 address issues like DR-2, DR-3, DR-22, and for him to have  
6 the standard by which he will apply the rule of the case and  
7 the opportunity for Optum and ESI to ask for  
8 reconsideration.

9 That's all we're asking for is for --

10 THE COURT: All right. Paul, I think I made  
11 it clear on both of those, all right, that both the law of  
12 the case and the procedures that we've all followed are  
13 going to continue. And they worked well. The procedures  
14 have worked very well.

15 And Special Master Cohen is very good and extremely  
16 knowledgeable, and I think he's been extremely helpful in  
17 resolving a whole lot of, you know, legitimate  
18 disagreements. I'm not saying that, you know, legitimate  
19 disagreements among counsel is the best way to proceed, all  
20 right? He's very effective at suggesting ways to resolve  
21 them. And a vast majority of the disagreements have ended  
22 that way. A small number have required his formal rulings,  
23 and that's what we've got. An even smaller number have led  
24 to appeals to me, and that's fine. I think that's -- it's  
25 worked very well for six years, there's no reason why it

1 can't work with OptumRx and Express Scripts, so -- okay --

2 MR. BOONE: Your Honor, this is Brian Boone  
3 again for OptumRx.

4 It sure sounded like Mr. Farrell was getting into the  
5 weeds a little bit, but I guess I want to make sure I  
6 understand because you're saying that it's law of the case,  
7 but that is different from saying that a ruling is  
8 precedential, that it would have some presumptive weight.  
9 And I guess I'm asking --

10 THE COURT: To me, Brian, it's the same thing,  
11 all right? I mean, law of the case -- I mean, it's --

12 MR. BOONE: We were --

13 THE COURT: It's a -- it is the law of the  
14 case in this MDL. My ruling, Special Master Cohen's  
15 rulings, they all apply. But a new litigant -- and I  
16 classify both of the PBMs here as new litigants -- the fact  
17 that you've been technically in the MDL from the beginning,  
18 you have not been a litigant until very recent.

19 So as a new litigant, you have the opportunity if you  
20 think a prior ruling should not apply to you, either because  
21 the law has changed or more likely that the facts, the  
22 circumstances, the situation of the PBM is different --  
23 fundamentally different from that of a manufacturer,  
24 distributor, or pharmacy -- and I think all of my rulings  
25 were in the context of one or all of those groups -- well,

1 of course, bring that to our attention. You may be right, I  
2 don't know, but you certainly have the right to bring that.

3 MR. BOONE: As --

4 THE COURT: But in the absence of that, you've  
5 got to follow them.

6 MR. BOONE: And, Your Honor, I guess that's  
7 what I'm trying to get to because, as you've said, we were  
8 not party to any of those proceedings.

9 THE COURT: But that doesn't matter. A lot of  
10 people weren't parties. This is the MDL. The judicial  
11 branch assigned this to me, all right? I have the authority  
12 of the whole branch. That -- you know, it's different. The  
13 judicial branch gave me the authority to manage this MDL,  
14 that's an independent branch of government. It's not just  
15 me.

16 So I've managed it. I've made rulings. Those rulings  
17 are the law of the case. You have to accept them. But  
18 because you're a new litigant, you have the opportunity to  
19 point out why they shouldn't apply to you, but you cannot  
20 disregard them or ignore them. If you do, I'll have to do  
21 what I know how to do.

22 MR. BOONE: And, Your Honor, we're not saying  
23 that we would ignore your rulings. What I'm saying, that as  
24 a matter of the rules, as a matter of due process, because  
25 we weren't party to any of those proceedings, they can't

1 automatically apply to us as a matter of the rules, as a  
2 matter of due process.

3 THE COURT: Well, I fundamentally disagree,  
4 Mr. Boone, so you're stuck with my interpretation, okay?

5 So just -- I respect that you -- you should just  
6 follow what I've said. And if you think that a prior ruling  
7 or, you know, an order of Special Master Cohen or a ruling  
8 that I made should not apply to your client because you're  
9 in a different -- if the facts and circumstances of a PBM is  
10 different from that of a manufacturer, distributor, or  
11 pharmacy, or some other reason why that order shouldn't  
12 apply to you, you have every right to make it, but otherwise  
13 it applies to you, and you've got to follow it.

14 MR. BOONE: And so, Your Honor, are you  
15 amending the case management order today on what you're  
16 saying? Because in the case management order --

17 THE COURT: Mr. Boone, I don't want to fight  
18 with you. I've said what I've said, all right?

19 If you don't think it's clear, I suggest you talk to  
20 maybe the counsel for Express Scripts, or call your  
21 counterparts with some of the other defendants, all right?  
22 These are very simple rules. No one else in this MDL has  
23 had any problem following them.

24 If you and your client are, I suggest, you know, you  
25 might rethink what you're doing, okay? But I'm not going

1 to -- I'm not going to quibble any more or say what ruling  
2 I've amended. I don't think I've amended a single thing.

3 MR. BOONE: Your Honor, our whole point is  
4 that we want to follow the rules. That's all we've been  
5 saying all along.

6 THE COURT: All right. Well, I appreciate  
7 that. These are the rules. These two -- these are two  
8 clear rules. One is the precedential value of prior orders  
9 and rulings, and the other is that it is a procedural rule  
10 of the road as how I want disagreements to be handled.  
11 So...

12 Okay. Anyone else wish to say anything?

13 Sometimes I've been accused of not letting people say  
14 enough, and I don't want that to be the case.

15 Any client reps wish to say anything? Obviously you  
16 were here to listen, but absolutely you're free to  
17 participate. I don't think I've met any of you.

18 MS. HASAN: No. Thank you, Your Honor.

19 THE COURT: Okay.

20 All right. Thanks, everyone. Have a good day.

21 (Proceedings concluded at 2:18 p.m.)

22

23 **C E R T I F I C A T E**

24 I certify that the foregoing is a correct transcript  
25 of the record of proceedings in the above-entitled matter  
prepared from my stenotype notes.

/s/ Gregory S. Mizanin February 28, 2024  
GREGORY S. MIZANIN, RDR, CRR DATE